SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 500

STATE OF MINNESOTA,

Petitioner,

vs.

NATIONAL TEA COMPANY AND ALLIED STORES CORPORATION (FORMERLY HAHN DEPARTMENT STORES, INCORPORATED).

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, the State of Minnesota, by its counsel, respectfully shows:

Summary Statement of the Matter Involved.

The National Tea Company, a foreign corporation conducting business in Minnesota by the system of chain stores, commenced an action in the District Court of Ramsey County, Minnesota, to recover from the State of Minnesota the sum of $118,740.08 and interest thereon (R. 60)

on account of chain store taxes paid under the Chain Store Tax Act.

The Allied Stores Corporation (at the time of the commencement of the action known as Hahn Department Stores, Incorporated), another chain store corporation conducting business in Minnesota, commenced an action in the same court to recover from said State the sum of $57,827.63, and interest thereon, on account of chain store taxes paid under the Act (R. 129).

The two cases involving identical questions of law and, to a very great extent, identical questions of fact, were consolidated and tried together before said district court and presented together on appeal to the State Supreme Court.

In each case the plaintiff asserted that the Act was invalid on the ground that it violated Section 1 of the Fourteenth Amendment to the Constitution of the United States and also several provisions of the State Constitution (R. 6-7; 93-94). The alleged violations of the State Constitution will be shown hereafter to be immaterial in determining whether this court has jurisdiction.

The Act levies a composite occupational tax consisting of two portions, provided for respectively in Sections 2(a) and 2(b), one based on the number of stores in the chain and one based on the total gross sales made by the chain. Each plaintiff brought action to recover both portions of the tax paid.

Section 2(a) of the Act levies a tax of $5 on each store in a chain in excess of one and not in excess of ten, the tax increasing group by group to a maximum of $155 for each store in excess of fifty. Section 2(b) of the Act levies a tax measured by gross sales of 1/20 per cent on the portion of gross sales not in excess of $100,000, this rate increasing in eleven steps to one per cent on that portion of gross sales in excess of $1,000,000.

The District Court rendered its decisions holding that part of the law valid which levied that portion of the tax based on the number of stores in the chain and holding invalid that portion of the tax based on total gross sales. On motion of plaintiff (R. 789 and 821) the first decisions were amended (R. 63-65, 133-152), the amended decisions altering certain findings of fact and certain conclusions of law. Judgment was entered for plaintiff in each case (R. 86, 152) and an appeal taken by the State to the Supreme Court of Minnesota (R. 87, 153). The two cases were argued together before the Supreme Court of Minnesota. That court rendered its decision upholding the judgments of the lower court and final judgments were entered for plaintiffs on June 27, 1939.

The statutory provision believed to sustain the jurisdiction of the Supreme Court of the United States to review by writ of certiorari the judgments of the Supreme Court of the State of Minnesota is Section 237(b) of the Judicial Code, as amended, United States Code Annotated, Title 28, Section 344(b), which provides:

> "It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had * * * where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution * * * of the United States; * * * and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied."

The statute of the State of Minnesota the validity of which is involved is Chapter 213 of the Session Laws of

the State of Minnesota, 1933 (pp. 265-272), as amended by Chapter 16 of the Extra Session Laws of Minnesota, 1933-1934 (pp. 19-21), which statute as amended appears in Mason's Minnesota Statutes, 1936 Supplement, as sections 5887-1 to 5887-18 inclusive (pp. 638-641). This statute and the amendment thereto are set forth in the appendix hereto as Exhibit A. This statute as amended will be referred to in this petition as "the Act."

The date of the judgment sought to be reviewed is June 27, 1939.

The date upon which the application for writ of certiorari is presented is November 3, 1939.

The time for making application for certiorari herein was on September 21, 1939, extended to and including October 17, 1939, by order of Mr. Justice Black, and on October 10, 1939, extended to and including November 6, 1939, by order of Mr. Chief Justice Hughes.

The Validity of a Statute of a State on the Ground of Its Being Repugnant to the Federal Constitution is Involved in These Cases.

The Supreme Court of Minnesota, the highest court of that State, held the Chain Store Tax Act invalid on the ground that it violates Section 1 of the Fourteenth Amendment. (See Minnesota Supreme Court's opinion, 286 N. W. 360, 362.) This brings the case within the provisions of the Judicial Code, Section 237 (b) as amended, 28 United States Code Annotated, Section 344 (b), which is quoted above.

In paragraphs III and XVIII of plaintiff's complaint in the *National Tea Company* case (R. 7 and 31) and in paragraphs III and XV of plaintiff's complaint in the *Allied Stores Corporation* case (R. 93-94 and 105) plaintiff alleges that the act is in violation of the following portion of Article XIV, Section 1, of the Amendments to the Constitution of the United States:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

These allegations are denied in paragraphs III and XVIII of defendant's answer in the *National Tea Company* case (R. 49, 53) and in paragraphs III and XV of defendant's answer in the *Allied Stores Corporation* case (R. 123, 126).

When all testimony on both sides had been presented, defendant moved that the actions of plaintiffs and of each of them be dismissed on the ground that the evidence presented had not substantiated a cause of action. The motion was denied and an exception was noted by defendant (R. 770).

The State District Court made findings that the imposition of the gross sales portion of the tax provided by Section 2 (b) of the act is "in violation of Article XIV, Section 1, of the Amendments to the Constitution of the United States." (*National Tea* case, Finding 17, R. 79) (*Allied Stores* case, Finding 17, R. 146-147).

The making of this finding was assigned as Error No. 5 in defendant's brief in the Supreme Court of Minnesota (R. 915).

The State District Court made a Conclusion of Law to the effect that the gross sales feature of the Act, as set forth in Section 2 (b) is unconstitutional as being "in violation of Article XIV, Section 1, of the Amendments to the Constitution of the United States." (*National Tea* case, Conclusion of Law 15, R. 84-85) (*Allied Stores* case, Conclusion of Law 14, R. 151). The making of this conclusion of law was assigned as Error No. 6 in defendant's brief in the Supreme Court of Minnesota (R. 915). In its decision in these cases, 286 N. W. 360 (R. 904), the Supreme Court of Minnesota held the gross sales portion of the tax invalid on the ground

that it is in violation of Article XIV, Section 1, of the Constitution of the United States and also in violation of a provision of the State constitution imposing identical restrictions. That the Minnesota Court held the restrictions imposed by the two constitutions to be identical is shown by the following quotation from the court's decision, 286 N. W. 362:

> "Under U. S. Const. Amend. XIV, S. 1, it is provided that, 'No state shall * * * deny to any person within its jurisdiction the equal protection of the laws.' Minn. Const. art. 9, S. 1, provides: 'Taxes shall be uniform upon the same class of subjects, * * *.' In Reed v. Bjornson, 191 Minn. 254, 253 N. W. 102, we held that *these provisions of the Federal and State Constitutions impose identical restrictions upon the legislative power of the state in respect to classification for purposes of taxation.*" (Italics ours.)

The Minnesota Supreme Court makes it clear that it considered itself in duty bound to follow the decisions of the Supreme Court of the United States holding similar progressive gross sales taxes invalid because in violation of Article XIV, Section 1, of the Amendments to the United States Constitution. It cites in support of its decision five cases, two of them cases in this Court, in each of which a progressive gross sales tax was held invalid because in violation of the first section of the Fourteenth Amendment and in each of which invalidity of an act because in violation of the first section of the Fourteenth Amendment was the controlling question, 286 N. W. 360, 363. After discussing these five cases the court says, p. 364 (R. 911):

> "We think the five cases to which we have referred have so definitely and finally disposed of the legal problem presented as to make it needless for us to analyze or discuss the great number of other tax cases where the same constitutional question was involved. *These being the only cases to which our attention has been called*

directly deciding the question presented, we are of the opinion that we should follow them and that it is our duty so to do." (Italics ours.)

The Questions Presented.

The main question presented is whether an act dividing chain stores into groups based on the amount of their aggregate sales, and levying on them a portion of an occupational tax increasing group by group according to the amount of their sales, is arbitrary and unreasonable and therefore in violation of Section 1 of the Fourteenth Amendment.

The several questions presented are stated in the assignments of errors in the two cases, which are identical and are as follows:

Assignment of Error in the Two Cases.

1.

The Supreme Court of Minnesota erred in holding that the gross sales portion of the Minnesota chain store tax is arbitrary, unreasonable, unequal and discriminatory and for that reason in violation of the first section of the Fourteenth Amendment and the uniformity of taxes clause of Section 1 of Article 9 of the Minnesota Constitution.

2.

The Supreme Court of Minnesota erred in considering only the revenue aspects of this tax and in failing to consider that this tax was levied also for the police power purpose of restraining the undue expansion of chain stores.

3.

The Supreme Court of Minnesota erred in failing to hold that the development of chain store groups in Minnesota

has had many effects injurious to the general welfare, among which are the following:

(1) By reason of the advantages of chain stores over independent stores, chain stores throughout Minnesota have gradually been driving independent stores out of business and gradually been taking over a larger and larger portion of the total field of retail sales made within the State.

(2) The development of chain store groups in Minnesota has driven out of business a considerable number of jobbers and wholesale houses within the State and thereby added considerably to unemployment and considerably lessened the value of the taxable property within the State.

(3) It has greatly reduced the number of traveling salesmen and thereby added to unemployment.

(4) It has caused farmers throughout the State to find less ready market for their fruit and vegetable products.

(5) Money has been withdrawn from banks in the villages and smaller cities where chain stores have operated and has been concentrated in the larger cities, thereby weakening the banking structure in rural communities.

A chain store group with a comparatively small number of stores is less injurious to the general welfare in the respects set forth in this paragraph than a chain store group with a large number of stores. The tendency is for the injury to the general welfare to increase with an increase in the number of stores in a chain.

4.

The Supreme Court of Minnesota erred in failing to hold that the composite chain store tax levied by the Act is an appropriate and valid measure to raise revenue and coun-

teract the social and economic ill effects produced by the undue expansion of chain stores.

5.

The Supreme Court erred in holding that the gross sales tax is laid as an excise upon individual sales, and that the sale of a given quantity of goods by a chain with large gross sales is the same act as the sale of the same quantity of goods by a chain with small gross sales.

6.

The Supreme Court of Minnesota erred in holding that the gross sales tax is not a privilege tax.

7.

The Supreme Court of Minnesota erred in holding that the amount of the gross sales portion of this chain store tax bears no relation to the value of the privilege granted.

8.

The Supreme Court erred in holding that there is no constant or uniform relation between the volume of gross sales and the amount or rate of net profit.

9.

The Supreme Court of Minnesota erred in holding that the classification of chain stores on the basis of volume of gross sales does not rest upon a rational relation to the purposes of the Act.

Opinions of the Courts Below.

The trial court rendered no opinions in these cases. Its final findings of fact and conclusions of law appear in the record at pages 63-85 and 133-152.

The opinion of the Supreme Court of the State of Minnesota appears at pages 904-911 of the record filed herewith. It is reported in 286 N. W. 360-364. The Minnesota report which will contain this decision has not been printed.

Reasons Relied on for the Allowance of the Writ.

The Question Presented Is a Question of Substance.

The question presented in this case is a question of substance. Not only are the immediate amounts involved large, $88,357.12 in the *National Tea* case (R. 86) and $72,346.61 in the *Allied Stores* case (R. 153), but the State must refund more than $600,000 in taxes and will be denied the right to collect over $800,000 in taxes in case the application for this writ is denied. It is, however, not only the State of Minnesota that is interested. More than twenty States have passed chain store tax laws. Other States are likely to do so. All of the States potentially are interested in a definite determination by the Court of the issue involved in the present case.

The Supreme Court of Minnesota Erred in Considering Only the Revenue Aspects of This Tax and in Failing to Consider That This Tax Was Levied Also for the Police Power Purpose of Restraining the Undue Expansion of Chain Stores.

The question whether the Act was passed for a police power purpose is a clear cut issue in the present cases. The absence of a police power purpose was alleged in plaintiffs' complaints (R. 4, 5, 91) and denied in defendant's answers (R. 48-49, 122-123). In its first findings of fact (in finding No. 2) the District Court found as follows:

> "The act was adopted by the legislature for the purpose of raising revenue and also, in the exercise of the police power, for the purpose of curbing the undue expansion of chain stores."

This finding is in accordance with the fact of common knowledge that the act was passed in the exercise of the police power to restrict the undue expansion of chain stores, as well as to raise revenue. It is supported by much uncontroverted evidence showing that chain stores are injurious to the general welfare. We refer especially to undisputed evidence showing:

Injuries to independent competitors (R. 551-552),

Destruction of jobbing houses (R. 562),

Increased unemployment of traveling salesmen (R. 562).

In its first finding of fact (in finding No. 11) the State District Court found as follows with reference to injuries caused by chain stores (R. 781-782, 814-815):

> "The development of chain store groups in Minnesota has had many effects injurious to the general welfare, among the most important of which are the following:
>
> (1) By reason of the advantages of chain stores over independent stores, chain stores throughout Minnesota have gradually been driving independent stores out of business and gradually been taking over a larger and larger portion of the total field of retail sales made within the state.
>
> (2) The development of chain store groups in Minnesota has driven out of business a considerable number of jobbers and wholesale houses within the state and thereby added considerably to unemployment and considerably lessened the value of the taxable property within the state.
>
> (3) It has greatly reduced the number of traveling salesmen and thereby added to unemployment.
>
> (4) It has caused farmers throughout the state to find a less ready market for their fruit and vegetable products.
>
> (5) Money has been withdrawn from banks in the villages and smaller cities where chain stores have

operated and has been concentrated in the larger cities, thereby weakening the banking structure in rural communities.

A chain store group with a comparatively small number of stores is less injurious to the general welfare in the respects set forth in this paragraph than a chain store group with a large number of stores. The tendency is for the injury to the general welfare to increase with an increase in the number of stores in a chain."

This finding that the act was passed for a police power purpose is likewise supported by that portion of the State District Court's ultimate findings, which states that chain store organizations have many substantial advantages over independent retailers. In so finding the District Court found in effect that chain store organizations possess the power to injure competitors and thereby to bring about the evil economic and social effects which the evidence showed.

Moreover, the State District Court in its ultimate findings definitely found injuries to competitors caused by chain stores, as follows (R. 73, 141):

"In the past prior to the passing of the unfair trade practices act in Minnesota in 1937 chain stores have injured competitors and extended their own business by the use of loss leaders."

Notwithstanding these facts the State District Court, upon motions of plaintiffs (R. 789, 821), struck its first finding No. 2 and substituted therefor a finding as follows (R. 68, 137):

"The act is essentially a revenue measure."

This action of the State District Court was assigned as Error No. 1 in the State's brief in the Supreme Court of Minnesota (R. 913).

The making of this finding and the failure to make the earlier finding that the Act was passed for the purpose of

raising revenue and to curb the undue expansion of chain stores was error for the following reasons:

1. It was a matter of common knowledge that the Act was passed in part to curb the undue expansion of chain stores.

2. The undisputed evidence showed that substantial injuries are caused by chain stores to weaker competitors, to jobbers and to traveling salesmen.

3. The District Court in its ultimate findings found that chain stores, by the use of loss leaders, have injured competitors. That finding indicates that there was a police power purpose in the passing of the Act.

4. The State District Court in its ultimate findings declared that chain stores have many substantial advantages over independent competitors in their methods of merchandising. When taken in connection with the ultimate finding that chain stores injure competitors, this finding indicates that the legislature in passing the Act might properly seek to equalize these disadvantages between these competing groups.

The State District Court upon motion of plaintiffs (R. 789-790, 821-822) likewise struck from its findings of fact its first finding No. 11 and substituted nothing therefor (R. 64-81, 132-148). This action of the State District Court was assigned as error No. 2 in the State's brief in the Supreme Court of Minnesota (R. 913).

The propriety of considering police power purposes in passing upon the validity of a tax measure was forcefully stated by this Court in the last chain store tax case, the *Grosjean* case, where this Court says (pp. 425-426):

> "Our decision need not, however, rest on conceptions of subject, measure and rate of tax. Much broader considerations touching the state's internal policy of police sustain the exaction."

The burden rests upon plaintiffs to show that there were no police power purposes in the passing of the Act. As was said by this Court in the case of *Borden's Farm Products Co.* v. *Baldwin*, 293 U. S. 194, 209:

> "When the classification made by the legislature is called in question, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of the existence of that state of facts, and one who assails the classification must carry the burden of showing by a resort to common knowledge or other matters which may be judicially noticed, or to other legitimate proof, that the action is arbitrary."

In the present cases we need not rely upon uncertain conjecture in our search for facts to sustain a finding that the Act was passed for police power purposes. The District Court's ultimate findings of chain store advantages points toward that conclusion. The District Court's ultimate findings of injuries caused by chain stores points to that conclusion.

When plaintiffs in their complaint tendered the issue as to whether the Act was passed for police power purposes they assumed the burden of proving that fact. This burden has not been sustained. Plaintiff presented no evidence showing that the legislature was not actuated by police power purposes in passing the Act.

This Court Is Asked to Reconsider Its Decision in the Case of Valentine v. *Great Atlantic and Pacific Tea Company.*

During the past eight years the question of the validity of progressive taxation of chain stores on the basis of size, size being measured by the number of stores in the chain, has come before this Court four times, namely, in the following cases:

State Board of Tax Commissioners v. *Jackson*, 283 U. S. 527, 51 S. Ct. 540, 75 L. Ed. 1248;

Liggett Co. v. *Lee*, 288 U. S. 517, 53 S. Ct. 481, 77 L. Ed. 780;

Fox v. *Standard Oil Co.*, 294 U. S. 87, 55 S. Ct. 333, 79 L. Ed. 780;
Valentine v. *Great Atlantic & Pacific Tea Company*, 299 U. S. 32, 57 S. Ct. 772, 81 L. Ed. 1193.

In each of these cases this Court upheld the validity of such a tax on the ground that the larger chains in point of number of stores possesses advantages over the smaller chains justifying classification and the imposition of a progressively higher tax as the number of units increases.

In 1936 in the Iowa chain store tax case, *Valentine* v. *Great Atlantic and Pacific Tea Co., supra,* hereafter referred to as the *Valentine* case, in a per curiam opinion from which Mr. Justice Brandeis and Mr. Justice Cardozo dissented and in which Mr. Justice Stone took no part, this Court considered and held invalid the progressive gross sales portion of the Iowa chain store tax, a tax very similar to the corresponding portion of the Minnesota tax. We contend that there is no difference in principle between classifying chain store organizations for taxation on the basis of the number of stores in the chain and classifying such stores for taxation on the basis of gross sales. Each is related to size and to the greater chain store advantage which greater size gives. Each is related to size and to the greater power to injure weaker competitors which greater size gives.

In the *Valentine* case, *supra,* this Court gives the following as its explanation for holding the gross sales portion of the Iowa chain store tax invalid (p. 33):

> "The decree is affirmed upon the authority of Stewart Dry Goods Co. *v.* Lewis, 294 U. S. 550."

We respectfully contend that this Court's decision in the *Stewart* case should not have ruled its decision in the *Valentine* case, and should not rule its decision in the present cases. Involved in the *Stewart* case was the validity of a progressive sales tax levied on substantially all retailers.

The tax was in no sense a chain store tax. Absent in the *Stewart* case but present in the *Valentine* case was the factor of the advantages of the chain store method of merchandising. Absent, therefore, in the *Stewart* case, was the power to uphold the classification on the ground that the chains with the larger gross sales possess greater chain store advantages than the chains with the smaller gross sales. The decision shows that this Court recognized that the classification presented in that case was not a chain store classification.

The Decision in the Valentine Case Unduly Restricts Legislatures in Their Choice of Means in Taxing Chain Stores.

The decision in the *Valentine* case, *supra*, unduly restricts State legislatures in their choice of means in taxing chain stores. The plaintiff in one of these two cases, Allied Stores Corporation, has larger gross sales in Minnesota than any other chain store organization—nearly $10,000,000 per year. Under the composite tax the gross sales portion of which was held invalid by the Minnesota District and Supreme Courts it paid a tax for the year 1934 of $40,907.38. But, as it has only two stores in Minnesota (although a large number in other States) the specific portion of that tax was only $5 (R. 847). Moreover, it would have been an utter impossibility to levy on this chain a tax of any considerable amount based on the number of stores without at the same time making that tax totally destructive to the chains with comparatively small sales per store. Such a composite tax is not arbitrary. It seems far more arbitrary to limit the tax to the specific tax with the result that Allied Stores, with nearly $10,000,000 in annual gross sales, pays a $5 tax, whereas National Tea Co., with annual gross sales of only a little more than $5,000,000, but with 155 stores, must pay $18,520, which is 3704 times as much (R. 847).

This Court is Asked to Reconsider Its Decision in the Stewart Case if It Shall Deem That Decision Pertinent to the Present Case.

In our opinion the Minnesota Act can be upheld without overruling the decision in the case of *Stewart Dry Goods Co.* v. *Lewis*, 294 U. S. 550, 55 S. Ct. 525, 79 L. Ed. 1054, hereafter referred to as the *Stewart* case. This Court, however, has said in the *Valentine* case that a gross sales tax on chain stores is invalid and referred to the *Stewart* case for authority. We, therefore, respectfully ask this Court to reconsider its decision in the *Stewart* case if it shall deem that decision pertinent to the present case. That decision was concurred in by only six judges, Mr. Justice Brandeis, Mr. Justice Stone and Mr. Justice Cardozo dissenting.

The Kentucky law under attack imposed a progressive gross sales tax on substantially all retail merchants. The majority opinion holds that tax invalid on the ground that there is no constant relation between greater sales and greater profit, and therefore no constant relation between greater sales and greater capacity to pay (R. 557-558). In his dissent, in which he argues that the tax was valid, Mr. Justice Cardozo takes the position that there "is a relation of correspondence between capacity to pay and the amount of business done" (R. 570). He points out that there is excellent authority for the conclusion that sales on a large scale are accompanied by differences of method with attendant advantages that are matters of common knowledge. He also points out that the Harvard Bureau of Business Research is authority for the conclusion that large scale merchandising enjoys not only an increment of profit expressed in terms of dollars but also an increment of profit when expressed as a percentage (R. 573-574). It is apparent that these differences between large and small scale merchandising offer a sound basis for classification and the imposition of a progressive sales tax.

The Decision of the Minnesota Supreme Court is Not in Harmony with Controlling Decisions of This Court.

There is no difference in principle between a progressive tax on chain store organizations based on the number of stores and a progressive tax on chain store organizations based on gross sales. The case of *Great Atlantic and Pacific Tea Co.* v. *Grosjean*, 301 U. S. 412, is the last chain store tax case decided by this Court. In that case this Court held valid a progressive chain store tax based on the number of stores in the chain and thereby upheld again and for the fourth time the proposition that classification of chain store organizations on the basis of size, and taxation on a progressive basis, is not arbitrary. This Court strongly emphasized the fact that the decision does not rest merely on conceptions of subject, measure and rate of tax, but on the State's police power to "forbid, as inimical to the public welfare, the prosecution of a particular type of business," and to regulate it "in such a manner as to abate evils deemed to arise from its pursuit."

The findings of fact in the present cases show, and if they did not, this Court would take judicial notice of the fact, that chain store organizations have many advantages in merchandising over independent stores and have injured competitors by unfair methods of doing business (R. 71 to 73; 139-142, 867-888). The Legislature of Minnesota has found a practicable way of reaching and curbing the undue expansion of all chain stores by means of a composite tax which reaches alike the chain that is large and powerful by reason of large gross sales, even though the number of its stores may be small, and the chain that is large and powerful by reason of its great number of stores. The power to curb for the general welfare the undue expansion of all chains is properly comprehended within the State's police power. It cannot properly be abridged by judicial decision.

The decision in the *Valentine* case is at variance with the decision of this Court in the case of *Pacific American Fisheries* v. *Alaska*, 269 U. S. 269, 46 S. Ct. 110, 70 L. Ed. 270. The Legislature of Alaska levied a progressive tax on fish canneries canning certain kinds of fish, graduated upward according to the amount of the pack. This Court held the tax not a violation of the due process clause of the Fifth Amendment. There can be no difference in principle between a progressive tax on the canning of cases of fish, canned for sale, and a progressive tax on gross sales.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Supreme Court of the State of Minnesota, commanding that court to certify and send to this Court, for its review and determination, a full and complete transcript of the record, and all proceedings of the said Supreme Court had in the cases numbered and entitled on its docket, Nos. 31948-31949, National Tea Company *v.* State of Minnesota, Allied Stores Corporation *v.* State of Minnesota, to the end that the decision and judgments of said Supreme Court may be reviewed and reversed by this Honorable Court and that judgments may be entered for the State of Minnesota.

STATE OF MINNESOTA,
By J. A. A. BURNQUIST,
Attorney General of the State of Minnesota;
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 500

STATE OF MINNESOTA,

Petitioner,

vs.

NATIONAL TEA COMPANY AND ALLIED STORES CORPORATION (FORMERLY HAHN DEPARTMENT STORES, INCORPORATED),

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Statement of the Case.

The facts of the two cases are stated adequately in the Petition for Certiorari.

ARGUMENT.

POINT I.

The controlling question in this case is a Federal question, the State question being so interwoven with the Federal question as not to be an independent matter.

It will be conceded that the State court held the gross sales portion of this chain store tax invalid on the ground

that it violates the "equal protection" clause of the Fourteenth Amendment. It may be contended, however, that while these cases were decided on that ground they were also decided on the ground that the gross sales portion of the tax violates that portion of section 1 of article 9 of the State Constitution reading: "Taxes shall be uniform upon the same class of subjects." Interpreting this clause the Supreme Court of Minnesota has said that "equality of protection includes uniformity of application to the subject of taxation and that our uniformity clause is not more restrictive than the equal protection clause of the Fourteenth Amendment."

This Court has held in a long line of decisions that "where the record discloses that judgment of a State court was based, not alone upon a ground involving a Federal question, but also upon another and *independent* ground, broad enough to maintain the judgment, this court will not take jurisdiction to review such judgment" (Italics ours). *Doyle v. Atwell*, 261 U. S. 590, 592. In case after case, however, this Court has pointed out that to prevent jurisdiction, the State ground must be an independent ground. *Doyle v. Atwell, supra*, p. 592; *Enterprise Irrigation District v. Canal Company*, 243 U. S. 57, 164; *Nickel v. Cole*, 256 U. S. 222, 225; *Fox Film Corporation v. Muller*, 296 U. S. 207, 210.

This Court has also held that "where the non-federal ground is so interwoven with the other as not to be an independent matter" the Court's jurisdiction is plain. *Enterprise Irrigation District v. Farmers Mutual Canal Co.*, 243 U. S. 157, 164. The point of all these cases is that to prevent jurisdiction the State matter decided must be independent of the Federal matter. A case exactly parallel with the present case on this point is *Morehead v. N. Y. ex rel. Tipaldo*, 298 U. S. 587, 603, where, (as stated by this Court, p. 603,) the Court of Appeals of New York held the minimum

wage act of that State repugnant to the due process clauses of the State and Federal Constitution." The fact that the New York court held the Act invalid because in violation of the due process clause of the State Constitution did not prevent this Court from taking jurisdiction on application for certiorari. It is true that in that case the New York court certified that the Federal constitutional question was present and necessarily passed on. But when the record is clear, as it is in the present case, it speaks for itself. We should note that in the present cases the opinion of the Minnesota court shows as clearly as any certification could that the Federal constitutional question was present, necessarily passed upon, and controlling, first, by stating definitely that the equal protection clause of the Fourteenth Amendment and the uniformity of taxes clause of the State constitution impose "identical restrictions upon the legislative power of the State in respect to classification for purposes of taxation," 286 N. W. 362; secondly, by referring to five cases, (p. 363) each of which involved the validity of a progressive gross sales tax under the first section of the Fourteenth Amendment, and then saying in conclusion (p. 364):

> "We think the five cases to which we have referred have so definitely and finally disposed of the legal problem presented as to make it needless for us to analyze or discuss the great number of other tax cases where the same constitutional question was involved. These being the only cases to which we have been referred directly deciding the question presented, we are of the opinion that we should follow them and it is our duty so to do."

The question presented and decided in every one of these cases was the question whether a progressive gross sales tax violates the equal protection clause of the Fourteenth

Amendment and this question was either the sole question or the controlling question in every case. That this is so is shown by the following quotations:

Stewart Dry Goods Co. v. *Lewis, supra*, p. 554:

> "The appellants charge that the statute violates several sections of the constitution of Kentucky and several provisions of the Federal Constitution. We shall not stop to enumerate these, since we must sustain the claim that the classification made by S. 2 denies the appellants the equal protection of the laws assured by the Fourteenth Amendment."

Valentine v. *Great Atlantic and Pacific Tea Co., supra*, p. 33:

> "The District Court, composed of three judges, held that the provision of S. 4 (b) of the statute, imposing a tax based on gross receipts from sales according to an accumulative graduated scale, was invalid under the equal protection clause of the Fourteenth Amendment of the Constitution of the United States as creating an arbitrary discrimination. * * *"
>
> "The decree is affirmed upon authority of Stewart Dry Goods Co. *v.* Lewis, 294 U. S. 550."

Ed. Shuster & Co., Inc. v. *Henry*, 261 N. W. 20, 22:

> "Because of the absence of that essential reasonable relation in the respects stated, the tax imposed under section 76.75 (3), Stats., is arbitrary and discriminatory, under the decision in the Stewart case, and therefore section 76.75, Stats., is in violation of the Fourteenth Amendment, U. S. Const., and void."

Lane Drug Stores v. *Lee*, 11 F. Supp. 672, 673:

> "It is unnecessary to discuss subdivision B of section 4 of the act, because the decision in Stewart Dry Goods Co. *v.* Lewis, * * * fully sustains the contention of plaintiffs that subdivision B of section 4 of the act is

> so arbitrary, unreasonable, and discriminatory that it denies to these plaintiffs equal protection of the law guaranteed by the Fourteenth Amendment of the United States Constitution."

Great Atlantic and Pacific Tea Co. v. *Harvey*, 107 Vt. 215, 177 A. 423:

> "The decision (in the Stewart case) is controlling in the instant case. The Supreme Court of the United States is the ultimate authority upon questions arising under the Federal Constitution. * * * If the Kentucky statute offends the Fourteenth Amendment, so does the one in issue before us." 177 A. 427.

The foregoing quotations from the five cases on which the Supreme Court of Minnesota relies makes it clear that the legal problem which it considered was the validity of a gross sales tax under the equality clause of the Fourteenth Amendment. Accordingly, when the State court says in its final paragraph, 286 N. W. 364, that these five cases have disposed of the legal question, it refers to the question as to the invalidity of the gross sales tax under the Fourteenth Amendment. The court says in effect that this Federal question was the controlling question in the case.

The State question presented in the present cases is clearly not independent of the Federal question. By the Minnesota Court's own statement, the equal protection clause of the Federal Constitution and the uniformity of taxes clause of the State Constitution "impose identical restrictions upon the legislative power of the State in respect to classification for purposes of taxation." In such a case it necessarily follows that the State court has but one decision to make, namely, whether the act is valid under both constitutions or invalid under both constitutions. Accordingly, this Court having held the Iowa tax on gross sales of chain stores invalid in the *Valentine* case, on authority of the *Stewart* case, the Minnesota Court could make no independent decision as

to the validity of the Minnesota tax on gross sales of chain stores, except to decide whether said tax and the Kentucky gross sales tax on gross sales of all retail stores were so similar as to be subject to the same objections as to their validity. The Minnesota Court found "the two acts so akin in language and purpose as to make them, in substance and effect, identical," 286 N. W. 362. This decision made, the Minnesota Court was in duty bound to follow the decision of this Court in the *Stewart* case and the *Valentine* case and hold the gross sales portion of the Minnesota tax invalid under the equal protection clause of the Fourteenth Amendment and, necessarily, the two being identical in restrictive effect for purposes of taxation, under the uniformity of taxes clause of the State Constitution. From this it follows that in the present cases the State question was not an independent question, but was controlled by this Court's earlier decision on the identical Federal question. The hands of the Supreme Court of Minnesota were tied by decisions of this Court which we respectfully contend are incorrect.

POINT II.

The Supreme Court of Minnesota erred in considering only the revenue aspects of this tax and in failing to consider that this tax was levied also for the police power purpose of restraining the undue expansion of chain stores.

This point has been adequately presented in the Petition for Certiorari.

POINT III.

This Court is asked to reconsider its decision in the case of Valentine v. Great Atlantic and Pacific Tea Company.

From 1931 to 1937, five cases involving the validity of progressive chain store tax laws have come before this Court for decision. These cases are the following:

State Board of Tax Commissioners v. *Jackson*, 283 U. S. 527, 51 S. Ct. 540, 75 L. Ed. 1248;

Liggett Co. v. *Lee*, 288 U. S. 517, 53 S. Ct. 481, 77 L. Ed. 929;

Fox v. *Standard Oil Co.*, 294 U. S. 87, 55 S. Ct. 333, 79 L. Ed. 780;

Valentine v. *Great Atlantic & Pacific Tea Company*, 299 U. S. 32; 57 S. Ct. 56, 81 L. Ed. 22;

Great Atlantic & Pacific Tea Co. v. *Grosjean*, 301 U. S. 412, 57 S. Ct. 772, 81 L. Ed. 1193.

For brevity these cases will be referred to respectively as the *Jackson* case, the *Liggett* case, the *Fox* case, the *Valentine* case and the *Grosjean* case. In four of these cases the tax was a progressive tax based on the number of stores in the chain. Such a tax was upheld on the ground that increased chain store advantages resulting from adding stores to the chain justify subclassification and a progressively higher tax on larger chains.

In the fifth case, the *Valentine* case, *supra;* which involved a progressive tax on chains measured by gross sales, very similar to the Minnesota tax, the tax was held invalid on authority of *Stewart Dry Goods Co.* v. *Lewis*, 294 U. S. 550. We respectfully contend that this decision was unsound for the following reasons:

1. The decision in the *Stewart* case was not pertinent to the facts of the *Valentine* case.

In the *Valentine* case the court passed upon the validity of a progressive tax on chain stores, measured by gross sales. In the *Stewart* case the court considered a progressive tax on substantially all retail sales whether made by chain stores or independent retailers. Consequently, important considerations of increased chain store advantage resulting from increased size were present in the *Valentine* case and could properly be used as a basis for classification,

but were not present in the *Stewart* case. Therefore, the holding of this Court in the *Stewart* case was not applicable to the *Valentine* case.

In rendering its decision in the *Stewart* case, the court took pains to point out that the tax involved was not a chain store tax. The court said (pp. 555-556):

> "The tax is not confined to a particular method of merchandising. All retailers, individual and corporate, selling every description of commodities, in whatever form their enterprises are conducted, make up the taxable class."

Later in the opinion, after referring to the three chain store tax cases then decided, the court said (p. 565):

> "The instant case presents a classification of quite a different kind. The Kentucky statute ignores the form of organization and the method of conducting business. The taxable class is retail merchants, whether individuals, partnerships or corporation; those who sell in one store or many; those who offer but one sort of goods and those who through departments deal in many forms of merchandise."

2. There is no difference in principle between a progressive tax on chain stores based on size, size being measured by the number of stores in the chain, and a progressive tax on chain stores based on size, size being measured by total gross sales.

In its findings of fact in each of the present cases (R. 71-73; 139-142) the District Court found that chains enjoy sixteen advantages over independent stores in their methods of doing business.

It found that chains buy in larger quantities and therefore secure larger quantity discounts. It is conceded that this advantage increases with an increase in the number of stores in the chain. But it is apparent that this advantage

increases as much with the addition of two stores with gross sales of $50,000 each as with the addition of ten stores with gross sales of $10,000 each. In other words, we do not know how great are the buying advantages of a given chain when we are told only the number of stores. We must also be told the average sales of each store. We must be given both the multiplier and the multiplicand. Greater gross sales mean greater buying power and greater quantity discounts. This surely is a consideration which the taxing power may take account of in levying its tax, as was done by the Minnesota legislature in levying this tax.

The Minnesota District Court found that the chain store groups receive substantial special rebates and advertising allowances not granted to independents, which increase with increases in the size of the chain.

This Court's opinion in the *Grosjean* case, *supra*, (p. 421), points out that the Great Atlantic and Pacific Tea Company received in one year more than $8,000,000 in secret rebates, advertising allowances and brokerage fees—more than $500.00 for each of its 15,000 stores. The evidence in the present case shows that the National Tea Company received large special and secret rebates by reason of large scale purchases (R. 867, 868, 870, 873-888). The court found that this is true generally of chain stores (R. 71, 140).

It is apparent that the great purchasing power which commands increasingly great special rebates is equally valuable whether it results from a great number of chain stores in one organization or from enormous sales from a few chain stores. It is therefore not arbitrary for the tax-levying authority to take note of this fact and levy a tax which reaches both classes of chains.

It seems unnecessary to pursue this line of argument through all the many chain store advantages. It is sufficiently clear that to accomplish the purposes of chain store

taxation, namely, to produce revenue and to restrict the undue expansion of chain stores, we need, and in fact must have, two measuring rods, the number of stores in the chain and total gross sales per chain.

The argument becomes still clearer when we note that this Court, in its decision in the last chain store tax case, the *Grosjean* case, *supra*, definitely recognizes that a progressive chain store tax may rest upon broader considerations than the rate of tax. This Court says:

> "Our decision need not, however, rest on conceptions of subject, measure and rate of tax. Much broader considerations touching the state's internal policy of police sustain the exaction. * * * In the exercise of its police power the state may forbid, as inimical to the public welfare, the prosecution of a particular type of business, or regulate a business in such manner as to abate evils deemed to arise from its pursuit. * * *
>
> "If, in the interest of the people of the state, the legislature deemed it necessary either to mitigate evils of competition as between single stores and chains or to neutralize disadvantages of small chains in their competition with larger ones, or to discourage merchandising within the state by chains grown so large as to become a menace to the general welfare, it was at liberty to regulate the matter directly or to resort to the type of taxation evidenced by the Act of 1934 as a means of regulation."

3. The decision in the *Valentine* case unduly restricts legislatures in their choice of means in taxing chain stores.

In raising revenue and in restricting the undue expansion of chain stores the legislature is equally interested in reaching the chain that has great chain store advantages and correspondingly great power to destroy competition by reason of its large number of stores and the chain that has such advantages and such power by reason of enormous sales from a few stores. Montgomery Ward & Co., with

total sales in Minnesota in 1934 of $6,777,204 from sixteen stores, paid a specific tax of $135, a nominal amount having no appreciably restrictive effect. Nor could any tax based on the number of stores have produced much revenue or had a substantially restrictive effect on such a chain, with average annual sales per store of more than $400,000, without destroying the average chain with average annual sales per store of about $40,000. On the other hand, the gross sales tax of $29,138.12 on this company was substantial (Original Exhibit A, p. 4).

J. C. Penney Co., with 62 stores and with gross sales in Minnesota in 1934 of $7,040,243, paid a specific tax of $4,105 and a gross sales tax of $60,130.62, a total tax of $64,235.62. (Original Exhibit A, p. 5.) If Minnesota must restrict its chain store tax to the specific tax on stores, its tax on Montgomery Ward, with sales of nearly $7,000,000, becomes only $135, whereas its tax on the Penney Co., with sales not far from the same, will be $4,105, or thirty times as much. On the other hand, if the composite tax is upheld, the Ward and the Penney taxes will be respectively $29,273.12 and $64,245.62.

It seems clear that there is a closer correspondence between the amounts of the composite taxes on these two chains and their respective chain store advantages than between the amounts of the specific taxes on these chains and their respective chain store advantages. It seems equally clear that there is a closer correspondence between the amounts of the composite taxes on these two chains and their respective power to injure competitors than between the amounts of the specific taxes on these chains and their power to injure competitors. Yet this Court (in the *Valentine* case) and the Minnesota courts (in these cases) declare the composite tax to be arbitrary and the specific tax to be unobjectionable. We cannot understand how a court can properly strike down as arbitrary a tax which in actual

operation proves to approach more nearly the ideal of absolute fairness and uphold as valid a similar tax which falls farther short of reaching that ideal.

It is a matter of common knowledge that chains have become so numerous and so large as to be a menace to successful merchandising by independents. This Court, in the *Grosjean* case, holds that a State by taxation may "discourage merchandising within the state by chains grown so large as to become a menace to the general welfare." Such discouragement, as to chains with enormous sales but few stores within the State, such as Allied Stores Corporation, cannot be effected by a progressive tax on stores. Levy a tax of $5,000 per store on Allied Stores Corporation with two stores in Minnesota and annual sales of nearly $10,000,000, and it will be nominal in its restrictive effect, but it would destroy every chain with average sales per store.

Point IV.

This Court is asked to reconsider its decision in the case of Stewart Dry Goods Co. v. Lewis if it shall deem the decision in that case pertinent to the facts of the present case.

This Court has held in the *Valentine* case that a progressive tax on chain stores based on total gross sales is not distinguishable in principle from a progressive tax on all stores, whether chain stores or independent, based on total gross sales. The latter tax was held invalid in the case of *Stewart Dry Goods Co.* v. *Lewis*, 294 U. S. 550, hereafter called the *Stewart* case. We have pointed out under Point II that there are substantial reasons for distinguishing the two cases. However, if this Court is of the opinion that the two kinds of taxes are not distinguishable in principle it becomes material in this argument to point out the reasons why this Court's decision in the *Stewart* case should be reconsidered.

That decision was rendered by a divided court, Mr. Justice Brandeis, Mr. Justice Stone, and Mr. Justice Cardozo dissenting.

The Kentucky law under attack in the *Stewart* case imposed a progressive gross sales tax on substantially all retailers. That act was held to be in violation of the equal protection clause of the Fourteenth Amendment because, in the opinion of the Court, classification for taxation on the basis of gross sales is not based on a reasonable relationship between the amount of the tax and the privilege taxed.

Mr. Justice Cardozo, speaking for the dissenting justices, takes the position that there is a reasonable relationship between the amount of business done and capacity to pay. In his view there is an intelligible economic theory underlying the progressively heavy incidence of the tax, namely, that there is a minimum size for business units below which efficiency is less on the average than expansion would make it; that there are intermediate levels within which efficiency is subject to progressive development; and that there are ultimate levels beyond which efficiency, if promoted, goes forward more slowly (p. 567).

The social theory underlying the tax, is that the little man, because of inferior capacity to pay, should bear the lighter burden (p. 567).

He very cogently points out (p. 579) that in prior chain store tax cases classification ran athwart the lines of profit, yet was sustained.

We believe a progressive tax on gross sales is sustainable for the following reasons:

1. There is a reasonable relationship between the amount of a progressive sales tax and capacity to pay.

2. There is generally an increase in the amount of profit with an increase in gross sales, and this is sufficient to sustain the tax.

3. Practical considerations make it necessary to accept approximate correspondence between the amount of taxes and capacity to pay.

POINT V.

The decision of the Supreme Court of Minnesota in the present cases is not in harmony with the decisions of this Court.

The decision of the Supreme Court of Minnesota is contrary in principle to four of the five chain store tax decisions of this Court. The only chain store tax decision of this Court which may be deemed to support the Minnesota Court is the decision in the *Valentine* case, *supra*. That decision held invalid a progressive tax on chain stores measured by gross sales, a tax similar to the Minnesota tax. But the decision in the *Grosjean* case is subsequent to the decision in the *Valentine* case. It follows that if we are correct in our contention that there is no difference in principle between a progressive tax on chain stores measured by the number of stores in the chain and a progressive tax on chain stores measured by gross sales, the *Grosjean* case tacitly overruies the *Valentine* case and upholds the validity of the Minnesota tax.

If the state can levy a progressive tax on chains based on size, using number of stores as the yardstick, it can levy a progressive tax on chains based on size, using gross sales as the yardstick, and it can levy a progressive tax on chains using both as the combined yardstick. This must be so unless there are unfair and arbitrary qualities in gross sales as a measure of chain store advantages and chain store power to cause injury to the general welfare not found in

number of stores as a measure. The most casual examination of the evidence in these cases will show that the combined yardstick, number of stores and gross sales, used in the Minnesota tax, bears a much closer relation to chain store advantages and chain store power to cause social and economic injuries, than does the single yardstick, number of stores.

We give below the amount of gross sales, the number of stores, the amount of the specific taxes, and the amount of the combined taxes of the two plaintiffs for the year 1934 (Original Exhibit A, pp. 3 and 5):

	Gross Sales.	No. of Stores.	Specific Tax.	Composite Tax.
Allied Stores Corporation.....	$9,714,374	2	$5	$10,907.38
National Tea Company.....	$5,288,845	154	$18,520	$63,742.51

These figures speak for themselves. The specific taxes of the Allied Stores Corporation compares with the specific taxes of National Tea Company as 1 to 3704, the composite tax, approximately, as 40 to 63. National Tea Company, with annual gross sales of a little over $5,000,000 cannot enjoy chain store advantages or chain store power to cause social and economic injuries 3704 times as great as Allied Stores Corporation, with annual sales of nearly $10,000,000. But the proportion of 63 to 40 is presumably approximately accurate.

An examination of the tax levy on more than 300 chains which operate in Minnesota, as shown by Original Exhibit A, will show that in every case the composite tax which the Minnesota courts condemn as arbitrary operates more equitably than the specific tax which they uphold.

This Court, in the *Grosjean* case, the last chain store tax case passed upon by this Court held valid a progressive specific tax on chain stores based on the number of stores in the chain. That is the case which should govern the decision of the Supreme Court of Minnesota. There being no

difference in principle between a progressive tax based on number of stores and a progressive tax based on both the number of stores and gross sales, unless the addition of the gross sales portion makes the composite tax more arbitrary than the specific tax, it follows that this Court, in upholding the progressive tax on the chain stores of Louisiana, based on the number of stores, in effect upheld the composite tax of Minnesota, unless there are arbitrary features in the composite tax not present in the specific tax. But an examination of the composite tax of Minnesota shows conclusively that the composite tax approaches much closer to the ideal of absolute fairness than does the specific tax standing alone.

The emphasis placed by this Court in the *Grosjean* case upon police power considerations shows that the decision in the present case is not in harmony with the decision of this Court in the *Grosjean* case. In the latter case this Court Court says (p. 425):

> "Our decision need not, however, rest on conceptions of subject, measure and rate of tax. Much broader considerations touching the state's internal policy of police sustain the exaction * * *. Taxation may be made the implement of the exercise of the state's police power; * * *.
>
> "If in the interest of the people of the state, the legislature deemed it necessary * * * to neutralize the disadvantages of small chains in their competition with large ones, or to discourage merchandising by chains grown so large as to become a menace to the general welfare, it was at liberty to regulate the matter directly or to resort to the type of taxation evidenced by the Act of 1934 as a means of regulation."

It is evident that if the Louisiana legislature, in the exercise of the State's police power, may discourage the growth of chains grown so large in number of stores as to become a menace to the general welfare, the Minnesota legislature

in the exercise of the police power of Minnesota, may discourage the growth of chains grown so large in gross sales as to become a menace to the general welfare by threatening to destroy the business of tens of thousands of independent merchants.

Point VI.

There is a reasonable relationship between this tax and the purposes of the Act.

It is a matter of common knowledge that the Minnesota chain store tax was levied for a dual purpose. The title of the act refers to it as "An act raising revenues, imposing a tax on conducting business by the system of chain stores." Implicit in the selection of chain stores for the imposition of a heavy tax from which all independent stores are free is the police power purpose of restricting the undue expansion of chain stores. The progressive rates make that purpose clearer.

The one objection made by the Supreme Court of Minnesota to a progressive chain store tax measured by gross sales is the absence of a close relationship between the amount of the tax and the net profit resulting from gross sales. The absence of such a relationship was not proved. Furthermore, we contend that in levying a chain store tax for the dual purpose of raising revenue and curbing the undue expansion of chain stores there need not be a close relationship between the amount of the tax and the amount of net profit. In fact, if the correspondence between the amount of the gross sales tax and the amount of net profit is close, the act can have but little effect in restraining the undue expansion of chain stores. It is only when the tax begins to cut severely into profit that the restraining influence becomes effective.

What we must have in order to satisfy the requirements of "equal protection" is a reasonable relationship between

the progressive rate of the tax and the dual purpose of the act. Clearly we have that relationship in the Minnesota Act. The gross sales tax on chains with small sales (less than $100,000 per year), and therefore small chain store advantages and little power to injure competitors, is very light, 1/20 of one per cent. This steps up gradually, as chain store advantages and power to injure competitors increase with increased gross sales, to one per cent for that portion of gross sales above $1,000,000. (Sec. 2 b of the Act.)

We must remember that the gross sales portion of this tax is not based on net income, but is based, exactly as is the specific portion, on the fact that chain store advantages and chain store capacity for injuring competitors, increase with size. There is no exact correspondence between the amount of a progressive chain store tax measured by the number of stores and the amount of net income. Every year there are many chains that make no profit. During depression periods a considerable portion of the chains make no profit. Yet this Court has not held that to be a valid objection to the constitutionality of a progressive tax based on the number of stores in a chain. It follows that the gross sales portion of the Minnesota tax should not be held invalid although there is no exact correspondence between this portion of the tax and net income.

The propriety of taxing chain stores in such a way as to restrict profit has been recognized by this Court. In the case of *Fox* v. *Standard Oil Co.*, *supra*, this Court says (p. 100):

> "A chain, as we have seen, is a distinctive business species, with its own capacities and functions. Broadly speaking its opportunities and powers become greater with the number of component links; and the greater they become, the more far-reaching are the consequences, both social and economic. For that reason the state may tax the large chains more heavily than the small ones, and upon a graduated basis, * * *. Not

only may it do this, but it may make the tax so heavy as to discourage the multiplication of units to an extent believed to be inordinate, and by the incidence of the burden develop other forms of industry."

We have heretofore quoted this Court's opinion in the *Grosjean* case to the same effect.

Summary of Argument.

I.

The controlling question in this case is a Federal question, the State question being so interwoven with the Federal question as not to be an independent matter.

II.

The Supreme Court of Minnesota erred in considering only the revenue aspects of this tax and in failing to consider that this tax was levied also for the police power purpose of restraining the undue expansion of chain stores.

III.

This Court is asked to reconsider its decision in the case of *Valentine* v. *Great Atlantic and Pacific Tea Company.*

IV.

This Court is asked to reconsider its decision in the case of *Stewart Dry Goods Co.* v. *Lewis,* if it shall deem the decision in that case pertinent to the facts of the present case.

V.

The decision of the Supreme Court of Minnesota in the present case is not in harmony with the decisions of this Court.

VI.

There is a reasonable relationship between this tax and the purposes of the act.

For the foregoing reasons we respectfully submit that this Court should grant a writ of certiorari to review the final judgments herein of the Supreme Court of Minnesota.

Respectfully submitted,

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EXHIBIT A.

CHAPTER 213.

Session Laws of the State of Minnesota passed during the Forty-Eighth Session of the State Legislature at the Session Commencing January 3, 1933.

An act raising revenues, imposing a tax on conducting business by the system of chain stores for selling or otherwise disposing of goods, wares, articles or commodities at retail, with certain exceptions providing for the assessment and collection thereof, and for the distribution of the proceeds therefrom, providing penalties for failure to pay such tax, defining certain crimes in connection with the enforcement of such tax, and appropriating money for the administration of this Act.

Be it enacted by the Legislature of the State of Minnesota:

SECTION 1. Definitions.—(a) The term "person", when used in this Act, shall include individuals, partnerships, trusts, associations, joint stock companies, corporations, and firms however organized or whatever be the plan of operation.

(b) There is hereby imposed upon every person engaged within the State of Minnesota in conducting a business by the system of chain stores from any of which are sold or otherwise disposed of at retail any goods, wares or merchandise, excepting any person selling at retail one or more of the following—fuel, lumber, building material, gasoline and oils, and grain, if the gross sales of any such person from such produce or products shall, during any year for which the tax is imposed, equal or exceed 95 per centum of the total gross sales from all sources of any such person, and excepting cooperative associations organized under the laws of this State in good faith and not for the purpose or with the intent of evading the tax hereby imposed, an annual tax for each calendar year during any part of which such taxpayers shall be so engaged, which tax shall be computed as hereinafter provided for.

SEC. 2. Rate of Tax.—The tax imposed by Section 1 shall be equal to the sum of the amount due under the provisions of subdivision (a) and the amount due under the provisions of subdivision (b) of this section 2, as follows:

(a) A specific amount to be determined as follows:

(1) $5.00 for each store in excess of one and not in excess of 10 if said business is conducted at not in excess of 10 stores or mercantile establishments within this state under a single or common ownership, supervision or management.

(2) $15.00 for each store in excess of 10 and not in excess of 20 if said business is conducted at in excess of 10 but not in excess of 20 stores or mercantile establishments within this state under a single or common ownership, supervision or management.

(3) $35.00 for each store in excess of 20 and not in excess of 30 if said business is conducted at in excess of 20 but not in excess of 30 stores or mercantile establishments within this state under a single or common ownership, supervision or management.

(4) $65.00 for each store in excess of 30 and not in excess of 40 if said business is conducted at in excess of 30 but not in excess of 40 stores or mercantile establishments within this state under a single or common ownership, supervision or management.

(5) $105.00 for each store in excess of 40 and not in excess of 50 if said business is conducted at in excess of 40 but not in excess of 50 stores, or mercantile establishments within this state under a single or common ownership, supervision or management.

(6) $155.00 for each store in excess of 50 if said business is conducted at in excess of 50 stores or mercantile establishments within this state under a single or common ownership, supervision or management.

(b) An amount based on the combined gross sales in excess of the exemption set forth in Section 4, of said business at all stores or mercantile establishments within this state under a single or common ownership, supervision or man-

agement, but which shall be computed by applying the following rates to the specified portions of such entire or combined gross sales in excess of said exemption.

(1) 1/20th of one per cent on that portion of the gross sales not in excess of $100,000.00.

(2) 2/20ths of one per cent on that portion of the gross sales in excess of $100,000.00 but not in excess of $200,000.00.

(3) 3/20ths of one per cent on that portion of the gross sales in excess of $200,000.00 and not in excess of $300,000.00.

(4) 4/20ths of one per cent on that portion of the gross sales in excess of $300,000.00 and not in excess of $400,000.00.

(5) 5/20ths of one per cent on that portion of the gross sales in excess of $400,000.00 and not in excess of $500,000.00.

(6) 6/20ths of one per cent on that portion of the gross sales in excess of $500,000.00 and not in excess of $600,000.00.

(7) 8/20ths of one per cent on that portion of the gross sales in excess of $600,000.00 and not in excess of $700,000.00.

(8) 10/20ths of one per cent on that portion of the gross sales in excess of $700,000.00 and not in excess of $800,000.00.

(9) 12/20ths of one per cent on that portion of the gross sales in excess of $800,000.00 and not in excess of $900,000.00.

(10) 15/20ths of one per cent on that portion of the gross sales in excess of $900,000.00 and not in excess of $1,000,000.00.

(11) One per cent on that portion of the gross sales in excess of $1,000,000.00.

SEC. 3. Definitions.—The terms "store" and "mercantile establishment" shall mean any fixed place at which said

business is conducted even if said place is at the same time being used for other purposes. Conducting a business by the system of Chain Stores shall mean conducting such business from two or more stores under a single or common ownership, supervision or management. Two or more stores or mercantile establishments shall, for the purposes of this Act, be treated as being under a single or common ownership, supervision or management if directly or indirectly owned or controlled by a single person or any group of persons having a common interest in such stores or mercantile establishments, or if any part of the gross revenues, net revenues, or profits from any such stores or mercantile establishments shall directly or indirectly be required to be immediately or ultimately made available for the beneficial uses, or shall directly or indirectly inure to the immediate or ultimate benefit, of any single person or any group of persons having a common interest therein.

SEC. 4. What are gross sales.—The term "gross sales" shall mean the money value of the consideration received or receivable by the vendor or transferror from the vendee or transferee from every retail sale or transfer made in connection with the business upon which the tax levied by Section 1 is imposed, excepting gross sales of goods, the sale of which at retail is excepted from the tax as provided in Section 1 (b), even when sold at stores, sales from which are subject to the tax hereby imposed. The amount thereof shall be determined in accordance with the method employed by the taxpayer in keeping his accounts. A taxpayer keeping his account on an accrual basis shall be permitted in each year to deduct a reasonable amount to care for bad debts attributable to the business for such year, subject to correction by including recoveries in gross sales for the year of recovery. A taxpayer keeping his accounts on the cash receipts and disbursements basis shall include the gross receipts from sales in the gross sales of the year of their receipt regardless of the year in which the sale was made. A taxpayer may, with the consent of the State Tax Commission, keep his accounts on the installment basis if such method properly reflects the gross sales of his business for any year, and said Commission may prescribe rules to in-

sure that such taxpayers shall properly allocate gross sales as between successive tax years. Gross sales shall not include the consideration received by a vendor from a purchaser if the sale is made from a store or mercantile establishments in this state to a purchaser residing without this state unless the purchaser is present within this state at the time of such sale and purchase. The tax imposed by Section 1, so far as measured by gross sales, shall be measured by the gross sales of the year for which the tax is imposed; provided, however, there shall be exempted from the total aggregate gross sales of any such business in each tax year the gross sales from that one of all the stores or mercantile establishments within this State under a single or common ownership, supervision or management, which the person on whom the tax is imposed shall select if the State Tax Commission is notified thereof prior to the first day of February of the year for which the tax is imposed, provided, further that as to the tax for 1933, such notification may be made on or before July 1st, 1933.

SEC. 5. Computation of tax.—The tax imposed hereby so far as measured by Section 2-(a) shall be computed on the basis of the number of stores under a single or common ownership, supervision or management on July 1st of each tax year.

SEC. 6. Tax period to begin July 1, 1933.—The first year for which this tax is hereby imposed shall be the period commencing with July 1st, 1933, and ending with December 31st, 1933. The tax imposed, so far as measured in accordance with Section 2-(a) shall for that period be due and payable on or before July 1st, 1933, and that portion of such tax so far as measured by Section 2-(b) shall be due and payable on or before January 20th, 1934.

SEC. 7. Date payable.—The tax imposed by Section 1 shall be payable as follows:

(a) That portion thereof measured by Section 2-(a) shall be paid on or before January 20th of each year.

(b) That portion thereof measured in accordance with Section 2-(b) shall be paid on or before January 20th of the

year succeeding that for which imposed or within 30 days after any person liable for such tax shall cease entirely to do business within this state of the kind on which the tax is imposed.

SEC. 8. Return to Tax Commission.—Every person on whom a tax is imposed by Section 1 shall make a return of his gross sales for the year for which the tax is imposed to the State Tax Commission on forms to be prepared by the Commission, and to be furnished him by said Commission. Said return shall be filed with the State Tax Commission on or before January 20th of the year following the year for which the tax is imposed or within 30 days after any such person shall cease entirely to do business within this state of the kind on which the tax is imposed. The Minnesota Tax Commission shall enter on its records, the amount of taxes found and determined by it to be due from any person, as hereinbefore provided, and on or before January 30th following, shall certify such amount to the State Auditor, who thereupon shall make his draft upon such person for the amount of taxes thus certified and place the same in the hands of the State Treasurer for collection. When such drafts have been placed by the State Auditor in the hands of the State Treasurer for collection, the State Treasurer shall mail, within 10 days, to the person from whom the tax is due, a written notice of the amount thereof and demand for its payment. The taxes shall be collected by and paid to the State Treasurer.

SEC. 9. Tax Commission may make assessment.—If any person required by this Act to file any return shall fail to do so within the time prescribed by this Act, or shall make, wilfully or otherwise, an incorrect, false or fraudulent return, he shall on the written demand of the Tax Commission file such return, or corrected return, within 30 days after the mailing to him of such written demand. If any person shall fail within said time to file such return, or corrected return, the Tax Commission shall make for him a return, or corrected return, from its own knowledge and from such information as it can obtain through testimony or otherwise, and assess a tax on the basis thereof, the amount of which tax

(less payment theretofore made on account of such tax) shall be certified to the State Auditor.

SEC. 10. Unpaid tax to be collected by sheriff.—If any such draft remains unpaid for more than 60 days after demand has been made by the Treasurer for its payment, recovery may be had thereon in an action in the name of the State in the same manner as if it were a debt due the State. Such tax may also be collected by having the State Auditor issue his warrant to the sheriff of any county of the state commanding him to levy upon and sell the real and personal property of the taxpayer within the county, and to return such warrant to the State Auditor and pay to him the money collected by virtue thereof by a time to be therein specified, not less than 60 days from the date of the warrant. The sheriff shall proceed thereunder to levy upon and seize any property of the taxpayer within his county, and shall sell so much thereof as is required to satisfy such taxes and his costs, but such sales shall as to their manner be governed by the laws applicable to sales of like property on execution issued against property upon a judgment of a court of record. The sheriff shall make a return to the State Auditor and the proceeds of such sale less the sheriff's costs shall be turned over by the State Auditor to the State Treasurer who shall retain such part thereof as is required to satisfy the tax and costs and pay over any balance to the taxpayer. No suit shall lie to enjoin the collection of the taxes imposed by this Act.

SEC. 11. May recover back illegal tax.—A taxpayer who has paid, voluntarily or otherwise, or from whom there has been collected (other than by the method provided for in the first sentence of Section 10) an amount of tax for any year in excess of that legally due for such year, may recover the excess by an action of law against the state in any court of record, but such action shall be commenced within 2 years after the tax claimed to be excessive has been paid.

SEC. 12. Interest on unpaid taxes.—Taxes shall bear interest at the rate of one per cent per month during the period during which they remain unpaid. Said interest shall be

collected in the same manner as hereinbefore provided for the collection of the taxes imposed by this Act.

SEC. 13. Violations a misdemeanor—Any person liable to a tax imposed by this Act who shall fail to pay the same when payable, or who shall violate any other provision of this Act, imposing duties on him, shall be guilty of a misdemeanor.

SEC. 14. Tax Commission to administer act.—The Minnesota Tax Commission shall administer and enforce the assessment of the tax imposed by this Act. It may make and publish such rules and regulations, not inconsistent with this Act, as it may deem necessary in enforcing its provisions. It shall cause to be prepared blank forms for the returns required by this Act, and shall distribute the same throughout the State and furnish them on application, but failure to receive or secure them shall not relieve any person from the obligation of making any return required of him by this Act.

SEC. 15. Tax Commission may examine books.—For the purpose of determining the correctness of any return, or of determining whether or not any person should have made a return or paid tax hereunder, the Tax Commission shall have the power to examine or cause to be examined any books, papers, records, or memoranda relevant to making such determination, whether such books, papers, records or memoranda are the property of or in the possession of the taxpayer or any other person. It shall further have the power to require the attendance of any taxpayer or other person having knowledge or information relevant to such determinations aforementioned, to compel the production of books, papers, records or memoranda by persons so required to attend, to take testimony on matters material to such determinations, and to administer oaths or affirmations in any such connection. The Tax Commission is empowered at any time and from time to time to require any owner or manager of any store in the State of Minnesota to file with the Tax Commission, a statement under oath, showing the ownership, management and control of such store for the purpose of determining whether or not such store is subject to the tax hereby imposed. Such statement

shall be in such form as the Tax Commission shall prescribe.

SEC. 16. Appropriation for expense.—There is hereby appropriated out of the moneys in the State Treasury, not otherwise appropriated, the sum of $10,000 for each of the fiscal years ending June 30, 1934, and June 30, 1935, respectively, which appropriation is hereby made to the State Tax Commission to be used by it for the purposes of collecting the tax provided for by this Act.

SEC. 17. Disposition of tax.—The revenue derived from taxes, interest, and fines provided for in this Act when collected is hereby appropriated for the purpose of being credited to the appropriation now annually made for aid to state high, graded, semi-graded, consolidated, industrial, and rural schools, as now provided by law, to be distributed by the Department of Education in accordance with existing laws.

SEC. 18. Provisions separable.—If any part or provision of this Act shall for any reason be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not impair or invalidate any other part or provision in the remainder of the Act; and, if any part or provision of this Act shall for any reason be adjudged by any court of competent jurisdiction constitutionally inapplicable to any case or situation within the terms of such part or provision, such judgment shall not impair or invalidate such part or provision as applied to any other case or situation within their terms; and, if any exception from the tax hereby imposed shall for any reason be adjudged by any court of competent jurisdiction invalid, the tax shall be imposed upon the taxable subject as to whom or which such exception has thus been held invalid.

Approved April 12, 1933.

CHAPTER 16.

Laws and Resolutions Enacted at the Extra Session of the Forty-Eighth Legislature Commencing December 5, 1933, and Concluding January 6, 1934.

An act to amend Laws 1933, Chapter 213, Section 11, and Mason's Minnesota Statutes of 1927, Section 49.

Be it enacted by the Legislature of the State of Minnesota:

SECTION 1. Recovery of over paid tax in certain cases.—That Section 11, Chapter 213 of Laws 1933 be and the same hereby is amended to read as follows:

"SEC. 11. A taxpayer who has paid, voluntarily or otherwise, or from whom there has been collected (other than by the method provided for in the first sentence of Section 10) any tax not legally due or any amount of tax in excess of that legally due may (1) file with the Tax Commission a claim for the refund of such tax or such excess and/or (2) recover the same by an action at law against the State in any court of record, but no such claim may be filed and no such action may be brought after the expiration of two years from the date of payment of the tax involved. If a taxpayer shall file with the Tax Commission a claim for refund hereunder, no action may be brought against the State to recover the tax included in such claim until said Commission has finally disposed thereof or has failed within six months after the filing of such claim to render final action thereon.

If the Tax Commission finds that the tax for the refundment of which claim is filed was not legally due or payable, it shall issue its certificate to the taxpayer for the refundment thereof, otherwise it shall disallow such claim.

Any claim for refund allowed by the Tax Commission, and any judgment recovered against the State in an action to recover any such tax, shall include interest upon the tax refunded or recovered from the date of payment until the date of refundment or judgment at the rate of six (6) per cent per annum, and any such judgment shall bear a like rate of interest from date of entry until date of payment thereof.

Any certificate for refundment issued by the Tax Commission hereunder or a certified copy of any judgment against the State recovered hereunder may be filed with the State Auditor, who shall thereupon issue his warrant on the State Treasurer for the amount thereof in favor of the payee of such certificate or judgment creditor, as the case may be, and it shall be the duty of the State Treasurer to pay all such warrants out of any funds in the state treasury not otherwise appropriated.

There is hereby appropriated out of any funds at any time in the state treasury not otherwise appropriated (but not exceeding at any time the total amount of taxes to that time paid or collected under this act plus interest at the rate of six (6) per cent per annum on the amount of each payment of taxes from the date paid until refunded by order of the Tax Commission, or repaid pursuant to judgment recovered hereunder or until claim for refundment thereof and action for the recovery thereof are barred hereunder) such sum or sums as may be necessary from time to time, to pay such refunds and judgments.

SEC. 2. Mason's Minnesota Statutes of 1927, Section 49, insofar as inconsistent herewith is hereby amended.

Approved December 23, 1933.

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